

Letter of Findings: 09-0825
Sales and Use Tax
For the Years 2006, 2007, 2008

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ISSUES

I. Sales Tax – Imposition.

Authority: IC § 6-2.5-2-1; IC § 6-2.5-8-8; IC § 6-8.1-5-1; 4 IC § 6-8.1-5-4; [45 IAC 2.2-8-12](#); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007).

Taxpayer protests the imposition of additional sales tax.

II. Tax Administration – Negligence Penalty.

Authority: IC § 6-8.1-10-2.1; [45 IAC 15-11-2](#).

STATEMENT OF FACTS

Taxpayer is in the business of selling antiques. Taxpayer operates the business as a sole proprietor. For income tax purposes Taxpayer files a Schedule C with his federal individual income tax return. The Indiana Department of Revenue ("Department") conducted a sales and use tax audit of Taxpayer for the years 2006, 2007, and 2008. The audit assessed additional sales tax. Taxpayer protested the assessment. A hearing was held and this Letter of Findings ensues. Additional facts will be provided as necessary.

I. Sales Tax – Imposition.

DISCUSSION

The Department assessed additional sales tax because the sales reported on Taxpayer's income tax return were greater than the sales reported on Taxpayer's sales tax returns. The Department's audit did not find any records for exempt sales, therefore, additional sales tax was assessed based on the numbers reported on the Schedule C.

Indiana imposes a sales tax on retail transactions made in Indiana. IC § 6-2.5-2-1(a). The person who acquires property in a retail transaction is liable for the tax on the transaction and, unless exempt, shall pay the tax to the retail merchant. The retail merchant shall collect the tax as agent for the state. IC § 6-2.5-2-1(b). If the Department reasonably believes that a person has not reported the proper amount of tax due, the Department shall make a proposed assessment of the amount of the unpaid tax on the basis of the best information available to the Department. IC § 6-8.1-5-1(a). Every person subject to a listed tax must keep books and records so that the Department can determine the amount, if any, of the person's liability for that tax by reviewing those books and records. IC § 6-8.1-5-4(a). A person must allow inspection of the books and records and returns by the Department or its authorized agents at all reasonable times. IC § 6-8.1-5-4(c). The notice of proposed assessment is prima facie evidence that the Department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made. IC § 6-8.1-5-1(c); Lafayette Square Amoco, Inc. v. Indiana Dep't of Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007).

IC § 6-2.5-2-1 states in full:

- (a) An excise tax, known as the state gross retail tax, is imposed on retail transactions made in Indiana.
- (b) The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state. (Emphasis added).

Next, IC § 6-2.5-8-8 states:

- (a) A person, authorized under subsection (b), who makes a purchase in a transaction which is exempt from the state gross retail and use taxes, may issue an exemption certificate to the seller instead of paying the tax. The person shall issue the certificate on forms and in the manner prescribed by the Department. A seller accepting a proper exemption certificate under this section has no duty to collect or remit the state gross retail or use tax on that purchase.
- (b) The following are the only persons authorized to issue exemption certificates:
 - (1) retail merchants, wholesalers, and manufacturers, who are registered with the Department under this chapter;
 - (2) organizations which are exempt from the state gross retail tax under [IC 6-2.5-5-21](#), [IC 6-2.5-5-25](#), or [IC 6-2.5-5-26](#) and which are registered with the Department under this chapter; and
 - (3) other persons who are exempt from the state gross retail tax with respect to any part of their purchases.
- (c) The Department may also allow a person to issue a blanket exemption certificate to cover exempt

purchases over a stated period of time. The Department may impose conditions on the use of the blanket exemption certificate and restrictions on the kind or category of purchases that are exempt.

(Emphasis added).

Finally, regulation [45 IAC 2.2-8-12](#) provides:

(a) Exemption certificates may be issued [sic.] only by purchasers authorized to issue such certificates by the Department of Revenue. Retail merchants, manufacturers, wholesalers and others who must register with the Department of Revenue and who qualify to purchase exempt from tax under this Act [\[IC 6-2.5\]](#) may issue exemption certificates with respect to exempt transactions. All persons or entities not required to register with the Department as retail merchants, manufacturers, or wholesalers, and who are exempt under this Act [\[IC 6-2.5\]](#) with respect to all or a portion of their purchases are authorized to issue exemption certificates with respect to exempt transaction provided an exemption number has been assigned by the Department of Revenue, or provided that the Department of Revenue has specifically provided a form and manner for issuing exemption certificates without the need for assigning an exemption number.

(b) Retail merchants are required to collect the sales and use tax on each sale which constitutes a retail transaction unless the merchant can establish that the item purchased will be used by the purchaser for an exempt purpose.

(c) All retail sales of tangible personal property for delivery in the state of Indiana shall be presumed to be subject to sales or use tax until the contrary is established. The burden of proof is on the buyer and also on the seller unless the seller receives an exemption certificate.

(d) Unless the seller receives a properly completed exemption certificate the merchant must prove that sales tax was collected and remitted to the state or that the purchaser actually used the item for an exempt purpose. It is, therefore, very important to the seller to obtain an exemption certificate in order to avoid the necessity for such proof. The mere filing of a Registered Retail Merchant Certificate number is not sufficient to relieve the seller of the responsibility to collect the sales tax or prove exempt use by the buyer.

(e) No exemption certificates are required for sales in interstate commerce, however, proper records must be maintained to substantiate such sales.

(f) An exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

(g) An exemption certificate or other evidence supporting an exempt sale must be maintained by the seller for at least three (3) years after the due date of the tax return upon which such exempt transaction is reported.

(h) Exemption certificates may be reproduced provided no change is made in the wording or content. (Emphasis added).

Therefore, as provided by IC § 6-2.5-8-8(a), a seller accepting a valid exemption certificate has no duty to collect or remit the state gross retail or use tax on a purchase. However, as provided by [45 IAC 2.2-8-12\(f\)](#), an exemption certificate issued by a purchaser shall not be valid unless it is executed in the prescribed and approved form and unless all information requested on such form is completed.

Taxpayer did not present his records prior or during the hearing to the Department in such a fashion that the Department could determine the proper amount of tax due. Taxpayer was directed at the hearing to specify which items included in Federal Schedule C gross sales numbers he was protesting should not be subject to sales or use tax in Indiana. For example, at the hearing Taxpayer argued that some of the Schedule C numbers were from rent, wholesale sales, sales to exempt organizations, etc. Taxpayer was directed to provide documentation to support these contentions, such as for example rental agreements corroborated by designations on Taxpayer's bank statements of those amounts, etc. Subsequent to the hearing, Taxpayer sent in his bank statements for each month of the three years at issue. For each month, Taxpayer provided a handwritten cover sheet summarizing total deposits that month, and broke down the total into summary amounts from rentals, savings transfers, wholesale sales, E-bay sales, and taxable sales. Apart from the amounts for rentals and savings transfers none of the other amounts were designated on the bank statements, therefore rendering it difficult to reconcile the totaled numbers on Taxpayer's summary sheets with the numbers on the bank statements. Furthermore, Taxpayer did not provide sample underlying documentation, except for two unsigned, undated, one-page rental agreements. The amounts on the rental agreements do not consistently match up to what Taxpayer points to as rental deposits on his bank statements. Taxpayer also presented documents presumably showing Taxpayer's sales at auctions. It is not clear what Taxpayer's intent was in presenting these auction documents, since auction sales are subject to sales tax.

While it is possible that the gross sales numbers reported on Taxpayer's Federal Schedule C overstate Taxpayer's sales subject to Indiana sales tax, Taxpayer has not maintained or presented his records in such a fashion to allow the Department to determine the amount, if any, of the person's liability for sales tax by reviewing those books and records. IC § 6-8.1-5-4(a).

FINDING

Taxpayer's protest is respectfully denied.

II. Tax Administration – Negligence Penalty.

DISCUSSION

The Taxpayer also protested the imposition of the ten percent negligence penalty pursuant to IC § 6-8.1-10-2.1. Indiana Regulation [45 IAC 15-11-2](#)(b) clarifies the standard for the imposition of the negligence penalty as follows:

Negligence, on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or Department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the Department is treated as negligence. Negligence shall be determined on a case by case basis according to the facts and circumstances of each taxpayer.

The standard for waiving the negligence penalty is given at [45 IAC 15-11-2](#)(c) as follows:

The Department shall waive the negligence penalty imposed under [IC 6-8.1-10-1](#) if the taxpayer affirmatively establishes that the failure to file a return, pay the full amount of tax due, timely remit tax held in trust, or pay a deficiency was due to reasonable cause and not due to negligence. In order to establish reasonable cause, the taxpayer must demonstrate that it exercised ordinary business care and prudence in carrying out or failing to carry out a duty giving rise to the penalty imposed under this section. Factors which may be considered in determining reasonable cause include, but are not limited to:

- (1) the nature of the tax involved;
- (2) judicial precedents set by Indiana courts;
- (3) judicial precedents established in jurisdictions outside Indiana;
- (4) published Department instructions, information bulletins, letters of findings, rulings, letters of advice, etc;
- (5) previous audits or letters of findings concerning the issue and taxpayer involved in the penalty assessment.

Reasonable cause is a fact sensitive question and thus will be dealt with according to the particular facts and circumstances of each case.

Taxpayer has not affirmatively established, as required by [45 IAC 15-11-2](#)(c), that its failure to pay sales tax on its purchases was due to reasonable cause and not due to negligence.

FINDING

Taxpayer's protest is respectfully denied.

CONCLUSION

Taxpayer's protest of the assessment of sales tax and negligence penalty is denied.

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